IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-1231

LOVELADIES PROPERTY OWNERS ASSOCIATION, INC., a Corporation of the State of New Jersey, JOINT COUNCIL OF TAXPAYERS OF SOUTHERN OCEAN COUNTY, INC., a Corporation of the State of New Jersey and LONG BEACH ISLAND CONSERVATION SOCIETY, INC., a Corporation of the State of New Jersey,

Petitioners,

vs.

MAX RAAB, UNITED STATES ARMY CORPS OF ENGINEERS, COL. C.A. SELLECK, JR., District Engineer, Philadelphia District, United States Army Corps of Engineers, BG JAMES L. KELLY, Division Engineer, North Atlantic Division, United States Army Corps of Engineers, UNITED STATES ENVIRONMENTAL PROTECTION AGENCY and GERALD M. HANSLER, Regional Director, Region II, United States Environmental Protection Agency,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR WRIT OF CERTIORARI

STEPHEN B. PATRICK,
Counsel for Petitioners,

Northwest Boulevard,
P.O. Box 304,
Newfield, New Jersey 08344

N.J. Appellate Printing Co., Inc., South Plainfield, New Jersey (201) 753-0200

TABLE OF CONTENTS

CASES CITED:

TABLE OF CONTENTS

TABLE OF CONTENTS

APPENDIX

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

No.

LOVELADIES PROPERTY OWNERS ASSOCIATION, INC., a Corporation of the State of New Jersey, JOINT COUNCIL OF TAXPAYERS OF SOUTHERN OCEAN COUNTY, INC., a Corporation of the State of New Jersey and LONG BEACH ISLAND CONSERVATION SOCIETY, INC., a Corporation of the State of New Jersey,

Petitioners,

vs.

MAX RAAB, UNITED STATES ARMY CORPS OF ENGINEERS, COL. C.A. SELLECK, JR., District Engineer, Philadelphia District, United States Army Corps of Engineers, BG JAMES L. KELLY, Division Engineer, North Atlantic Division, United States Army Corps of Engineers, UNITED STATES ENVIRONMENTAL PROTECTION AGENCY and GERALD M. HANSLER, Regional Director, Region II, United States Environmental Protection Agency,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

The Petitioners pray that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit, entered in the above case on December 7, 1976.

OPINIONS BELOW

The opinion of the District Court for the District of New Jersey is unreported. A copy appears at Appendix A, *infra,* p. 1a. The United States Court of Appeals for the Third Circuit affirmed the judgment of the United States District Court without opinion.

JURISDICTION

The order of the United States Court of Appeals for the Third Circuit was entered on December 7, 1976. This petition for certiorari was filed less than 90 days from said date. The jurisdiction of this Court is invoked under 28 U.S.C. §1257(3).

QUESTIONS PRESENTED

The Petitioners' complaint was dismissed on motion for summary judgment on the grounds that the Administrative Procedure Act 5 U.S.C. §701, *et seq.*, did not grant U.S. District Court jurisdiction to review the actions of the Corps of Engineers under the Rivers and Harbors Act of 1899 33 U.S.C. §401, *et seq.* and that adequate relief was afforded pursuant to the citizen suit provisions of the Federal Water Pollution Control Act, 33 U.S.C. §1365. The questions thereby arising are:

1. Whether the Administrative Procedure Act, 5 U.S.C. §701, *et seq.*, grants original jurisdiction to permit a Federal District Court to review the actions of the U.S. Army Corps of Engineers, taken pursuant to the Rivers and Harbors Act of 1899, 33 U.S.C. §401, *et seq.* in a suit brought by private organizations.

2. Whether the Federal Water Pollution Control Act, 33 U.S.C. §1251, *et seq.* affords adequate remedy against the U.S. Army Corps of Engineers.

STATUTES INVOLVED

a. Administrative Procedure Act, 5 U.S.C. §701, *et seq.*

§ 701. Application; definitions

(a) This chapter applies, according to the provisions thereof, except to the extent that–

(1) statutes preclude judicial review; or

(2) agency action is committed to agency discretion by law.

(b) For the purpose of this chapter–

(1) "agency" means each authority of the Government of the United States, whether or not it is within or subject to review by another agency, but does not include–

(A) the Congress;

(B) the courts of the United States;

(C) the governments of the territories or possessions of the United States;

(D) the government of the District of Columbia;

(E) agencies composed of representatives of the parties or of representatives of organizations of the parties to the disputes determined by them;

(F) courts martial and military commissions;

§702. Right of review

A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof.

§703. Form and venue of proceeding

The form of proceeding for judicial review is the special statutory review proceeding relevant to the subject matter in a court specified by statute or, in the absence or inadequacy thereof, any applicable form of legal action, including actions for declaratory judgments or writs of prohibitory or mandatory injunction or habeas corpus, in a court of competent jurisdiction. Except to the extent that prior, adequate, and exclusive opportunity for judicial review is provided by law, agency action is subject to judicial review in civil or criminal proceedings for judicial enforcement.

§704. Actions reviewable

Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review. A preliminary, procedural, or intermediate agency action or ruling not directly reviewable is subject to review on the review of the final agency action. Except as otherwise expressly required by statute, agency action otherwise final is final for the purposes of this section whether or not there has been presented or determined an application for a declaratory order, for any form of reconsideration, or, unless the agency otherwise requires by rule and provides that the action meanwhile is inoperative, for an appeal to superior agency authority.

b. Rivers and Harbors Act of 1899, 33 U.S.C. §§401, 403,

Section 401. Construction of bridges, causeways, dams, or dikes generally.—It shall not be lawful to construct or commence the construction of any bridge, dam,

dike, or causeway over or in any port, roadstead, haven, harbor, canal, navigable river, or other navigable water of the United States until the consent of Congress to the building of such structures shall have been obtained and until the plans for the same shall have been submitted to and approved by the Chief of Engineers and by the Secretary of War [Secretary of Army]: Provided, That such structures may be built under authority of the legislature of a State across rivers and other waterways the navigable portions of which lie wholly within the limits of a single State, provided the location and plans thereof are submitted to and approved by the Chief of Engineers and by the Secretary of War [Army] before construction is commenced: And provided further, That when plans for any bridge or other structure have been approved by the Chief of Engineers and by the Secretary of War [Army], it shall not be lawful to deviate from such plans either before or after completion of the structure unless the modification of said plans has previously been submitted to and received the approval of the Chief of Engineers and of the Secretary of War [Army]. (Mar. 3, 1899, c. 425, §9, 30 Stat. 1151.)

403. Obstruction of navigable waters generally—Excavations and filling in—Authorization by Secretary of Army.—The creation of any obstruction not affirmatively authorized by Congress, to the navigable capacity of any of the waters of the United States is hereby prohibited; and it shall not be lawful to build or commence the building of any wharf, pier, dolphin, boom, weir, breakwater, bulkhead, jetty, or other structures in any port, roadstead, haven harbor, canal, navigable river, or other water of the United States, outside established harbor lines, or where no harbor lines have been established, except on plans recommended by the Chief of Engineers and au-

thorized by the Secretary of War [Secretary of the Army]; and it shall not be lawful to excavate or fill, or in any manner to alter or modify the course, location, condition, or capacity of, any port, roadstead, haven, harbor, canal, lake, harbor or refuge, or inclosure within the limits of any breakwater, or of the channel of any navigable water of the United States, unless the work has been recommended by the Chief of Engineers and authorized by the Secretary of War [Army] prior to beginning the same. (Mar. 3, 1899, c. 425, §10, 30 Stat. 1151.)

406. Penalty for violations—Enforcement by injunction.—Every person and every corporation that shall violate any of the provisions of sections nine, ten, and eleven of this Act [§§401, 403, and 404 of this title], or any rule or regulation made by the Secretary of War [Secretary of Army] in pursuance of the provisions of said section eleven [§404 of this title], shall be deemed guilty of a misdemeanor, and on conviction thereof shall be punished by a fine not exceeding $2,500 nor less than $500, or by imprisonment (in the case of a natural person) not exceeding one year, or by both such punishments, in the discretion of the court. And further, the removal of any structures or part of structures erected in violation of the provisions of the said sections may be enforced by the injunction of any district court exercising jurisdiction in any district in which such structures may exist, and proper proceedings to this end may be instituted under the direction of the Attorney General of the United States. (Mar. 3, 1899, c. 425, §12, 30 Stat. 1151; Feb. 20, 1900, c. 23, §2, 31 Stat. 32).

411. Penalty for wrongful deposit of refuse—Use of or injury to harbor improvements, and obstruction of navigable waters generally.—Every person and every corporation that shall violate, or that shall knowingly aid, abet, authorize, or instigate a violation of the provisions of sections thirteen, fourteen, and fifteen of this Act [§§407, 408, 409 of this title] shall be guilty of a misdemeanor, and on conviction thereof shall be punished by a fine not exceeding $2,500 nor less than $500, or by imprisonment (in the case of a natural person) for not less than thirty days nor more than one year, or by both such fine and imprisonment, in the discretion of the court, one-half of said fine to be paid to the person or persons giving information which shall lead to conviction. (Mar. 3, 1899, c. 425, §16 in part, 30 Stat. 1153).

c. Federal Water Pollution Control Act, 33 U.S.C. §§1319, 1341, 1344, 1365

1319. Federal enforcement.—(a)(1) Whenever, on the basis of any information available to him, the Administrator finds that any person is in violation of any condition or limitation which implements section 301, 302, 306, 307, or 308 of this Act [33 U.S.C.S. §§1311, 1312, 1316, 1317, 1318] in a permit issued by a State under an approved permit program under section 403 of this Act [33 U.S.C.S. §1342] he shall proceed under his authority in paragraph (3) of this subsection or he shall notify the person in alleged violation and such State of such finding. If beyond the thirtieth day after the Administrator's notification the State has not commenced appropriate enforcement action, the Administrator shall issue an order requiring such person to comply with such condition or limitation or shall bring a civil action in accordance with subsection (b) of this section.

(2) Whenever, on the basis of information available to him, the Administrator finds that violations of permit conditions or limitations as set forth in paragraph

(1) of this subsection are so widespread that such violations appear to result from a failure of the State to enforce such permit conditions or limitations effectively, he shall so notify the State. If the Administrator finds such failure extends beyond the thirtieth day after such notice, he shall give public notice of such finding. During the period beginning with such public notice and ending when such State satisfies the Administrator that it will enforce such conditions and limitations (hereafter referred to in this section as the period of "federally assumed enforcement"), the Administrator shall enforce any permit condition or limitation with respect to any person—

(A) by issuing an order to comply with such condition or limitation, or

(B) by bringing a civil action under subsection (b) of this section.

(3) Whenever on the basis of any information available to him the Administrator finds that any person is in violation of section 301, 302, 306, 307, or 308 of this Act [33 U.S.C.S. §§1311, 1312, 1316, 1317, 1318], or is in violation of any permit condition or limitation implementing any of such sections in a permit issued under section 402 of this Act [33 USCS § 1342] by him or by a State, he shall issue an order requiring such person to comply with such section or requirement, or he shall bring a civil action in accordance with subsection (b) of this section.

(4) A copy of any order issued under this subsection shall be sent immediately by the Administrator to the State in which the violation occurs and other affected States. Any order issued under this subsection shall be by personal service and shall state with reasonable specificity the nature of the violation, specify a time for compliance, not to exceed thirty days, which the Administrator determines is reasonable, taking into account

the seriousness of the violation and any good faith efforts to comply with applicable requirements. In any case in which an order under this subsection (or notice to a violator under paragraph (1) of this subsection) is issued to a corporation, a copy of such order (or notice) shall be served on any appropriate corporate officers. An order issued under this subsection relating to a violation of section 308 of this Act [33 U.S.C.S. §1318] shall not take effect until the person to whom it is issued has had an opportunity to confer with the Administrator concerning the alleged violation.

(b) The Administrator is authorized to commence a civil action for appropriate relief, including a permanent or temporary injunction, for any violation for which he is authorized to issue a compliance order under subsection (a) of this section. Any action under this subsection may be brought in the district court of the United States for the district in which the defendant is located or resides or is doing business, and such court shall have jurisdiction to restrain such violation and to require compliance. Notice of the commencement of such action shall be given immediately to the appropriate State.

(c)(1) Any person who willfully or negligently violates section 301 302, 306, 307, or 308 of this Act [33 U.S.C.S. §§1311, 1312, 1316, 1317, 1318], or any permit condition or limitation implement any of such sections in a permit issued under section 402 of this Act [33 U.S.C.S. §342] by the Administrator or by a State, shall be punished by a fine of not less than $2,500 nor more than $25,000 per day of violation, or by imprisonment for not more than one year, or by both. If the conviction if for a violation committed after a first conviction of such person under this paragraph, punishment shall be by a fine of not more than $50,000 per day of viola-

tion, or by imprisonment for not more than two years, or by both.

(2)Any person who knowingly makes any false statement, representation, or certification in any application, record, plan, or other document filed or required to be maintained under this Act [33 U.S.C.S. §§1251-1376] or who falsifies, tampers with, or knowingly renders inaccurate any monitoring device or method required to be maintained under this Act [33 U.S.C.S. §§1251-1376], shall upon conviction, be punished by a fine of not more than $10,000, or by imprisonment for not more than six months, or by both.

(3) For the purposes of this subsection, the term "person" shall mean, in addition to the definition contained in section 502(5) of this Act [33 U.S.C.S. §1362 (5)], any responsible corporate officer.

(d) Any person who violates section 301, 302, 306, 307, or 308 of this Act [33 U.S.C.S. §§1311, 1312, 1316, 1317, 1318], or any permit condition or limitation implementing any of such sections in a permit issued under section 402 of this Act [33 U.S.C.S. §1342] by the Administrator, or by a State, and any person who violates any order issued by the Administrator under subsection (a) of this section, shall be subject to a civil penalty not to exceed $10,000 per day of such violation.

(e) Whenever a municipality is a party to a civil action brought by the United States under this section, the State in which such municipality is located shall be joined as a party. Such State shall be liable for payment of any judgment, or any expenses incurred as a result of complying with any judgment, entered against the municipality in such action to the extent that the laws of that State prevent the municipality from raising revenues needed to comply with such judgment. (June 30, 1948, c. 758, Title III, §309, as amended, Oct. 18, 1972, P. L. 92-500, §2, 86 Stat. 859.)

1341. Certification.——(a)(1) Any applicant for a Federal license or permit to conduct any activity including, but not limited to, the construction or operation of facilities, which may result in any discharge into the navigable waters, shall provide the licensing or permitting agency a certification from the State in which the discharge originates or will originate, or, if appropriate, from the interstate water pollution control agency having jurisdiction over the navigable waters at the point where the discharge originates or will originate, that any such discharge will comply with the applicable provisions of sections 301, 302, 306, and 307 of this Act [33 U.S.C.S. §§1311, 1312, 1316, 1317]. In the case of any such activity for which there is not an applicable effluent limitation or other limitation under sections 301(b) and 302 [33 USCS §§1311(b), 1312], and there is not an applicable standard under section 306 and 307 [33 U.S.C.S. §§1316, 1317], the State shall so certify, except that any such certification shall not be deemed to satisfy section 511(c) of this Act [33 U.S.C.S. §1371]. Such State or interstate agency shall establish procedures for public notice in the case of all applications for certification by it and, to the extent it deems appropriate procedures for public hearings in connection with specific applications. In any case where a State or interstate agency has no authority to give such a certification, such certification shall be from the Administrator. If the State, interstate agency, or Administrator, as the case may be, fails or refuses to act on a request for certification, within a reasonable period of time (which shall not exceed one year) after receipt of such request, the certification requirements of this subsection shall be waived with respect to such Federal ap-

plication. No license or permit shall be granted until the certification required by this section has been obtained or has been waived as provided in the preceding sentence. No license or permit shall be granted if certification has been denied by the State, interstate agency, or the Administrator, as the case may be.

(2) Upon receipt of such application and certification the licensing or permitting agency shall immediately notify the Administrator of such application and certification. Whenever such a discharge may affect, as determined by the Administrator, the quality of the waters of any other State, the Administrator within thirty days of the date of notice of application for such Federal license or permit shall so notify such other State, the licensing or permitting agency, and the applicant. If, within sixty days after receipt of such notification, such other State determines that such discharge will affect the quality of its waters so as to violate any water quality requirement in such State, and within such sixty-day period notifies the Administrator and the licensing or permitting agency in writing of its objection to the issuance of such license or permit and requests a public hearing on such objection, the licensing or permitting agency shall hold such a hearing. The Administrator shall at such hearing submit his evaluation and recommendations with respect to any such objection to the licensing or permitting agency. Such agency, based upon the recommendations of such State, the Administrator, and upon any additional evidence, if any, presented to the agency at the hearing, shall condition such license or permit in such manner as may be necessary to insure compliance with applicable water quality requirements. If the imposition of conditions cannot insure such compliance such agency shall not issue such license or permit.

(3) The certification obtained pursuant to paragraph (1) of this subsection with respect to the construction of any facility shall fulfill the requirements of this subsection with respect to certification in connection with any other Federal license or permit required for the operation of such facility unless, after notice to the certifying State, agency, or Administrator, as the case may be, which shall be given by the Federal agency to whom application is made for such operating license or permit, the State, or if appropriate, the interstate agency or the Administrator, notifies such agency within sixty days after receipt of such notice that there is no longer reasonable assurance that there will be compliance with the applicable provisions of sections 301, 302, 306, and 307 of this Act [33 U.S.C.S. §§1311, 1312, 1316, 1317] because of changes since the construction license or permit certification was issued in (A) the construction or operation of the facility, (B) the characteristics of the waters into which such discharge is made, (C) the water quality criteria applicable to such waters or (D) applicable effluent limitations or other requirements. This paragraph shall be inapplicable in any case where the applicant for such operating license or permit has failed to provide the certifying State, or, if appropriate, the interstate agency or the Administrator, with notice of any proposed changes in the construction or operation of the facility with respect to which a construction license or permit has been granted, which changes may result in violation of section 301, 302, 306, or 307 of this Act [33 U.S.C.S. §§1311, 1312, 1316, 1317].

(4) Prior to the initial operation of any federally licensed or permitted facility or activity which may result in any discharge into the navigable waters and with respect to which a certification has been obtained pursuant to paragraph (1) of this subsection, which facility or activity is not subject to a Federal operating license or per-

mit, the licensee or permittee shall provide an opportunity for such certifying State, or, if appropriate, the interstate agency or the Administrator to review the manner in which the facility or activity shall be operated or conducted for the purposes of assuring that applicable effluent limitations or other limitations or other applicable water quality requirements will not be violated. Upon notification by the certifying State, or if appropriate, the interstate agency or the Administrator that the operation of any such federally licensed or permitted facility or activity will violate applicable effluent limitations or other limitations or other water quality requirements such Federal agency may, after public hearing, suspend such license or permit. If such license or permit is suspended, it shall remain suspended until notification is received from the certifying State, agency, or Administrator, as the case may be, that there is reasonable assurance that such facility or activity will not violate the applicable provsiions of section 301, 302, 306, or 307 of this Act [33 U.S.C.S. §§1311, 1312, 1316, 1317].

(5) Any Federal license or permit with respect to which a certification has been obtained under paragraph (1) of this subsection may be suspended or revoked by the Federal agency issuing such license or permit upon the entering of a judgment under this Act [33 U.S.C.S. §§1251-1376] that such facility or activity has been operated in violation of the applicable provisions of section 301, 302, 306, or 307 of this Act [33 U.S.C.S. §§1311, 1312, 1316, 1317].

(6) No Federal agency shall be deemed to be an applicant for the purposes of this subsection.

(7) Except with respect to a permit issued under section 402 of this Act [33 U.S.C.S. §1342], in any case where actual construction of a facility has been lawfully

commenced prior to April 3, 1970, no certification shall be required under this subsection for a license or permit issued after April 3, 1970, to operate such facility, except that any such license or permit issued without certification shall terminate April 3, 1973, unless prior to such termination date the person having such license or permit submits to the Federal agency which issued such license or permit a certification and otherwise meets the requirements of this section.

(b) Nothing in this section shall be construed to limit the authority of any department or agency pursuant to any other provision of law to require compliance with any applicable water quality requirements. The Administrator shall, upon the request of any Federal department or agency, or State or interstate agency, or applicant, provide, for the purpose of this section, any relevant information on applicable effluent limitations, or other limitations, standards, regulations, or requirements, or water quality criteria, and shall, when requested by any such department or agency or State or interstate agency, or applicant, comment on any methods to comply with such limitations, standards, regulations, requirements, or criteria.

(c) In order to implement the provisions of this section, the Secretary of the Army, acting through the Chief of Engineers, is authorized, if he deems it to be in the public interest, to permit the use of spoil disposal areas under his jurisdiction by Federal licensee or permittees, and to make an appropriate charge for such use. Moneys received from such licensees or permittees shall be deposited in the Treasury as miscellaneous receipts.

(d) Any certification provided under this section shall set forth any effluent limitations and other limita-

tions, and monitoring requirements necessary to assure that any applicant for a Federal license or permit will comply with any applicable effluent limitations and other limitations, under section 301 or 302 of this Act [33 U.S.C.S. §1311 or 1312], standard of performance under section 306 of this Act [33 U.S.C.S. §1316], or prohibition, effluent standard, or pretreatment standard under section 307 of this Act [33 U.S.C.S. §1317], and with any other appropriate requirement of State law set forth in such certification, and shall become a condition on any Federal license or permit subject to the provisions of this section. (June 30, 1948, c. 758, Title IV, §401, as amended, Oct. 18, 1972, P. L. 92-500, §2, 86 Stat 877.)

1344. Permits for dredged or fill material.—(a) The Secretary of the Army, acting through the Chief of Engineers, may issue permits, after notice and opportunity for public hearings for the discharge of dredged or fill material into the navigable waters at specified disposal sites.

(b) Subject to subsection (c) of this section, each such disposal site shall be specified for each such permit by the Secretary of the Army (1) through the application of guidelines developed by the Administrator, in conjunction with the Secretary of the Army, which guidelines shall be based upon criteria comparable to the criteria applicable to the territorial seas, the contiguous zone, and the ocean under section 403(c) [33 U.S.C.S. §1343(c)], and (2) in any case where such guidelines under clause (1) alone would prohibit the specification of a site, through the application additionally of the economic impact of the site on navigation and anchorage.

(c) The Administrator is authorized to prohibit the specification (including the withdrawal of specification) of any defined area as a disposal site, and he is authorized to deny or restrict the use of any defined area for specification (including the withdrawal of specification) as a disposal site, whenever he determines, after notice and opportunity for public hearings, that the discharge of such materials into such area will have an unacceptable adverse effect on municipal water supplies, shellfish beds and fishery areas (including spawning and breeding areas), wildlife, or recreational areas. Before making such determination, the Administrator shall consult with the Secretary of the Army. The Administrator shall set forth in writing and make public his findings and his reasons for making any determination under this subsection. (June 30, 1948, c. 758, Title IV, §404, as amended, Oct. 18, 1972, P. L. 92-500, §2 86 Stat. 884.)

1365. Citizen suits.—(a) Except as provided in subsection (b) of this section, any citizen may commence a civil action on his own behalf—

(1) against any person (including (i) the United States, and (ii) any other governmental instrumentality or agency to the extent permitted by the eleventh amendment to the Constitution) who is alleged to be in violation of (A) an effluent standard or limitation under this Act [33 U.S.C.S. §§1251-1376] or (B) an order issued by the Administrator or a State with respect to such a standard or limitation, or

(2) against the Administrator where there is alleged a failure of the Administrator to perform any act or duty under this Act [33 U.S.C.S. §§1251-1376] which is not discretionary with the Administrator.

The district courts shall have jurisdiction, without regard to the amount in controversy or the citizenship of the tion, or such an order, or to order the Administrator to apply any appropriate civil penalties under section 309(d) of this Act [33 U.S.C.S. §1319].

(A) prior to sixty days after the plaintiff has given notice of the alleged violation (i) to the Administrator, (ii) to the State in which the alleged violation occurs, and (iii) to any alleged violator of the standard, limitation, or order, or

(B) if the Administrator or State has commenced and is diligently prosecuting a civil or criminal action in a court of the United States, or a State to require compliance with the standard, limitation, or order, but in any such action in a court of the United States any citizen may intervene as a matter of right.

(2) under subsection (a)(2) of this section prior to sixty days after the plaintiff has given notice of such action to the Administrator, except that such action may be brought immediately after such notification in the case of an action under this section respecting a violation of sections 306 and 307(a) of this Act [33 U.S.C.S. §§1316, 1317(a)]. Notice under this subsection shall be given in such manner as the Administrator shall prescribe by regulation.

(c)(1) Any action respecting a violation by a discharge source of an effluent standard or limitation or an order respecting such standard or limitation may be brought under this section only in the judicial district in which such source is located.

(2) In such action under this section, the Administrator, if not a party, may intervene as a matter of right.

(d) The court, in issuing any final order in any action brought pursuant to this section, may award costs of litigation (including reasonable attorney and expert witness fees) to any party, whenever the court determines such award is appropriate. The court may, if a temporary restraining order or preliminary injunction is sought,

require the filing of a bond or equivalent security in accordance with the Federal Rules of Civil Procedure.

(e) Nothing in this section shall restrict any right which any person (or class of persons) may have under any statute or common law to seek enforcement of any effluent standard or limitation or to seek any other relief (including relief against the Administrator or a State agency).

(f) For purposes of this section, the term "effluent standard or limitation under this Act" [33 U.S.C.S. §§1251-1376] means (1) effective July 1, 1973, an unlawful act under subsection (a) of section 301 of this Act [33 U.S.C.S. §1311]; (2) an effluent limitation or other limitation under section 301 or 302 of this Act 33 U.S.C.S. §1311 or 1312]; (3) standard of performance under section 306 of this Act [33 U.S.C.S. §1316]; (4) prohibition, effluent standard or pretreatment standards under section 307 of this Act [33 U.S.C.S. §1317]; (5) certification under section 401 of this Act [33 U.S.C.S. §1341]; or (6) a permit or condition thereof issued under section 402 of this Act [33 U.S.C.S. §1342], which is in effect under this Act [33 U.S.C.S. §§1251-1376] (including a requirement applicable by reason of section 313 of this Act [33 U.S.C.S. §1323]).

(g) For the purposes of this section the term "citizen" means a person or persons having an interest which is or may be adversely affected.

(h) A Governor of a State may commence a civil action under subsection (a), without regard to the limitations of subsection (b) of this section, against the Administrator where there is alleged a failure of the Administrator to enforce an effluent standard or limitation under this Act the violation of which is occurring in

another State and is causing an adverse effect on the public health or welfare in his State, or is causing a violation of any water quality requirement in his State. (June 30, 1948, c. 758, Title V, §505, as amended, Oct. 18, 1972, P. L. 92-500, §2, 86 Stat. 888.)

STATEMENT OF THE CASE

This Petition is brought as the result of the Order of the United States Court of Appeals for the Third Circuit affirming the order of the United States District Court for the District of New Jersey, George R. Barlow, U.S.D.J., entered February 3, 1976, dismissing the amended complaint of plaintiffs with prejudice as to the claims brought under the Rivers and Harbors Act of 1899. That dismissal was as a result of motions made by attorneys for defendant Raab and for the U.S. Government, which were made prior to the filing of any answer to the amended complaint.

Factually, this case arose when defendant Raab commenced filling operations on a certain piece of land owned by him in the Loveladies Section of Long Beach Township, Ocean County, New Jersey. That land was located on the Barnegat Bay side of Long Beach Island. Barnegat Bay has previously been determined to be a navigable body of water. In the course of the filling operations, several mosquito ditches, which were subject to the daily tidal flow of waters, were filled. It is uncontested that the basic level of the land, prior to the filling operation, was 1.5 feet above the mean high water mark and that the land was below the local extreme high water mark, having been completely covered by water on such occasions as the March, 1962, storm which struck the east coast of the country.

These filling operations were commenced in the fall of 1972. On December 11, 1972, the U.S. Corps of Engineers, through the District Engineer in Philadelphia, (then COL Carroll D. Strider) directed that Raab cease all filling operations and submit a proper application to the Corps for a permit. This was done.

In the ensuing months, the Corps conducted the required investigation into such matters as environmental impact and impact on navigation and, after a considerable time, the Division Engineer (by then COL C.A. Selleck, Jr.) forwarded the recommendations of his office to his superior, the Division Engineer, BG James L. Kelly. The recommendation was that the application be denied and that Raab be directed to restore the site to its original state.

It should be noted at this point that no specific basis for the Corps' involvement had been raised. BG Kelly, in rendering his decision, apparently determined that the Corps' right to control this filling operation arose out of the Rivers and Harbors Act of 1899, 33 USC §401, *et seq*. BG Kelly determined that the Corps, in fact, had no jurisdiction over the filling operation and directed that Raab be so advised. This action then followed.

BASIS FOR FEDERAL JURISDICTION

This is one of the points at issue. It is Petitioners' contention that the Administrative Procedure Act, 5 U.S.C. §701, *et seq*. operates to grant federal jurisdiction in this case.

REASONS FOR GRANTING WRIT

Point I

The Administrative Procedure Act operates to grant Federal jurisdiction in this case.

At present, there is a disagreement among the several circuits as to whether the Administrative Procedure Act (APA) operates to expand the jurisdictional authority of the Federal District Court.

Those circuits holding that jurisdiction is not extended by the APA generally rely on the phrase in Section 703 of the APA which reads: ". . . in a court of competent jurisdiction," and hold that one must first see if the court has initial jurisdiction to consider the matter before considering the question of the relief actually sought under the act. For example, *Ove Gustaffson Contracting Co. v. Floete*, 278 F.2d 912 (2d. Cir. 1960) (but see *Aguayo v. Richardson*, 472 F.2d 1090 (2d Cir. 1973) in which the Second Circuit stated: "In *Mills v. Richardson* . . . we said the question whether the APA was an independent jurisdictional grant has not been decided in this circuit."); *Local 542, International Union of Operating Engineers, AFL-CIO v. N.L.R.B.*, 328 F.2d 850 (3d Cir. 1964); *Bramblitt v. Desobry*, 490 F.2d 405 (6th Cir. 1974); *Twin Cities Chippewa Tribal Council v. Minnesota Chippewa Tribe*, 370 F.2d 529 (8th Cir. 1967); *Arizona St. Dept. of Pub. W. v. Department of Health, E. & W.*, 499 F.2d 456 (9th Cir. 1971), certiorari denied, 405 U.S. 919, 92 S.Ct. 945, 30 L.Ed.2d 789 (1972) (but see *State of Washington v. Udall*, 417 F.2d 1310, 1319 (9th Cir. 1969) which was neither expressly overruled nor even commented upon by *Arziona St. Dept. of Pub. W. v. Department of Health, E. & W.*); *Chournos v. United States*, 335 F.2d 918 (10th Cir. 1964).

Other circuits have held that the APA does confer jurisdiction, *e.g.*, *Bradley v. Weinberger*, 483 F.2d 410 (1st Cir. 1973); *Deering Milliken v. Johnston*, 295 F.2d 856 (4th Cir. 1961); *Pickus v. United States Board of Parole*, 507 F.2d 1107 (D.C. Cir. 1974). Those courts finding a jurisdictional grant rely on such statutory language as: "A person . . . adversely affected or aggrieved by agency action . . . is entitled to judicial review thereof." (5 U.S.C. §702) Or ". . . final agency action for which there is no other adequate remedy in a court . . ." (5 U.S.C. §704).

The crux of the matter appears to be in the meaning of the first sentence of 5 U.S.C. §703, which says:

> The form of proceeding for judicial review is the special statutory review proceeding relevant to the subject matter in a court specified by statute or, *in the absence or inadequacy thereof, any applicable form of legal action, including actions for declaratory judgments or writs of prohibitory or mandatory injunction or habeas corpus, in a court of competent jurisdiction.* (emphasis added)

The emphasized portion is the section at issue here. The courts finding no expansion of jurisdiction, when they have analyzed the language of the act, appear to fix first on the phrase "in a court of competent jurisdiction," considering that they must first examine the normal jurisdiction of the court. Then, if that barrier is passed, go on to consider aspects of the case applicable to the act. Those courts finding that the APA merely codified procedures for review without granting jurisdiction, have not commented at all on what changes were actually wrought by the act; that is, how the procedure differed after the APA was adopted from what it was prior to its adoption.

Ove Gustaffson Contracting Co. v. Floete, supra, said "The purpose of §10 is to define the procedures and manner of judicial review of agency action . . ." but there is no indication that the procedures followed by the courts prior to the adoption of the APA were substantially different from those followed later. That raises the question of what purpose, then, the act really accomplished if there was no meaningful difference before and after adoption of the APA.

While it is conceded that there is no express statement, either in the APA or in any Supreme Court opinion to the effect that the APA creates expanded federal jurisdiction, it is suggested that the Supreme Court has done everything short of making that express statement.

In *Heikkila v. Barber*, 345 U.S. 229, 232, 73 S.Ct. 603, 605, 97 L.Ed. 972 (1953) the Court, commenting on the legislative history of the APA said:

> The spirit of these statements together with the broadly remedial purposes of the Act counsel a judicial attitude of hospitality toward the claim that §10 greately expanded the availability of judicial review.

Moreover, it is suggested that in *Abbott Laboratories v. Gardner*, 387 U.S. 136, 87 S.Ct. 1507, 18 L.Ed.2d 681 (1967) the Supreme Court did squarely deal with the issue and resolved it in favor of expanded jurisdiction. Although the Court did not announce that the found expanded jurisdiction in so many words, the case has a very distorted meaning if it is construed otherwise. None of the cases decided since 1967 in any of the Circuits which have held that the APA did not expand jurisdiction have mentioned *Abbott Laboratories*. It is only those circuits which have found such jurisdiction which deal with the case.

The pertinent part of the *Abbott Laboratories* opinion stated:

> The question is phrased in terms of "prohibition" rather than "authorization" because a survey of our cases shows that judicial review of a final agency action by an aggrieved person will not be cut off unless there is a persuasive reason to believe that such was the purpose of Congress. [citations omitted] Early cases in which this type of judicial review was entertained, *e.g. Shields v. Utah Idaho Central R. Co.*, 305 U.S. 177; *Stark v. Wickard*, 321 U.S. 288, have been reinforced by the enactment of the Administrative Procedure Act, which embodies the basic presumption of judicial review to one "suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of the relevant statute." 5 U.S.C. §702, so long as no statute precludes such relief or the action is not one committed by law to agency discretion. 5 U.S.C. §701(a). The Administrative Procedure Act provides specifically not only for a review of "[a]gency action made reviewable by statute" but also for a review of "final agency action for which there is no other adequate remedy in a court," 5 U.S.C. §704. The legislative material elucidating that seminal act manifests a congressional intention that it cover a broad spectrum of administrative actions, and this Court has echoed that theme by noting that the Administrative Procedure Act's "generous review provisions must be given a 'hospitable' interpretation. [citations omitted] Again, in *Rusk v. Cort.*, supra, at 379-380, the Court held that only upon a showing of "clear and convincing evidence" of a contrary legislative intent should the courts restrict access to judicial review.

The Court, by way of footnote supporting its position, cited a portion of the report from the House, in which that body stated:

> To preclude judicial review under a bill a statute, if not specific in withholding such review, must upon its face give clear and convincing evidence of an intent to withhold it. The mere failure to provide specifically by statute for judicial review is certainly no evidence of intent to withhold review.
>
> H.R. Rep. No. 1980, 79th Cong., 2d. Sess., 41 (1946)

It is curious to call an act which some Circuits have held to merely codify and organize the procedure for review a "seminal act," as the Supreme Court did the APA. Moreover, it is apparently impossible to reconcile the Supreme Court's position in *Abbott Laboratories* that the act under which review is sought must either expressly bar review or bar it clearly by implication and that failing such bar the aggrieved person is entitled to review, with the view that there must also be a jurisdictional hurdle crossed before one can avail himself of the APA. Taking the instant case, the Rivers and Harbors Act of 1899 does not afford any provision for review and the District Court has therefore held that it has no jurisdiction to review the Corps of Engineers' actions under that act which means, in effect, that all of the actions of the Corps of Engineers under that act are immune from review based on any citizen's complaint. This circular reasoning hardly accords with the view taken in *Abbott Laboratories* as to the purpose of the APA and it can only make sense if one holds that the APA does operate as a grant of jurisdiction. As was pointed out by the court itself, in oral argument before the Court of Appeals, if the APA does not operate to grant jurisdiction, the Corps of Engineers could potentially declare the Mississippi River unnavigable and no one would be able to challenge their determination because there would be no jurisdiction to review that determination.

The current state of affairs is that there does exist a difference of opinion among the circuits as to the impact of the APA. This obviously promotes forum shopping. Had this same suit been brought in the District of Columbia, jurisdiction would have been found and the case would have been heard on its merits. A clear example is the case of *National Resources Defense Council v. Callaway*, Civil No. 74-1242, D.D.C., March 27, 1975. It is a case upon which petitioners intended to rely rather heavily in any plenary hearing of the matter. In *Callaway* plaintiffs expressly cited the APA as a principal source of jurisdiction and in fact each point of jurisdiction raised by plaintiffs in *Callaway* has been raised in the instant case. In *Callaway*'s case it was successful. Here, to date, it has been unsuccessful and the only difference is the court in which the suit was originally brought.

In summary, it is urged that this difference between the circuits is not a desirable one, especially on such an important question as whether an act grants original jurisdiction to bring a case in a Federal Court and for that reason a Writ of Certiorari is sought so that the matter can be decided with some finality and uniformity.

Point II

The Court erred in determining that relief by way of Mandamus was not appropriate.

The District Court denied relief by way of mandamus on the grounds that adequate relief is available elsewhere. Specifically, the court was referring to the citizen suit provisions of the Federal Water Pollution Control Act (FWPCA), 33 U.S.C. §1365.

A review of the Rivers and Harbors Act of 1899 reveals no means by which a citizen can obtain redress for

an abuse of discretion by the Corps of Engineers, unless via the route sought in Point I.

Undoubtedly the FWPCA overlaps the Rivers and Harbors Act to some extent. However, even the FWPCA gives no direct right of relief against the Corps of Engineers. The Corps is given certain powers under the FWPCA, see, e.g., 33 U.S.C. §§1341(c), 1344 and although the Corps was apparently acting under its Rivers and Harbors Act authority in the instant case, an argument could be made that in fact it was acting under some sort of dual authority. Still, the FWPCA affords a citizens action against the Administrator of the Environmental Protection Agency and against no one else. 33 U.S.C. §1365(a)(2). However, that suit can only be brought when the Administrator has failed to perform a non-discretionary act. There is no provision for the review of any flagrant abuse of discretion on his part.

A review of the FWPCA shows that there is little that the Administrator could do to compel some action by the Corps of Engineers and less that the Administrator could be forced to do by way of a citizens' suit. The Administrator can, pursuant to §1319(a)(3) of the FWPCA, issue an order requiring compliance with any section of the FWPCA deemed violated or can commence suit, under §1319(b) of the FWPCA to injoin further action by the alleged polluter. Since Mr. Raab has already ceased his filling operations, short of directing him to remove the fill, there is nothing which the Administrator could do in the instant case. The worst damage was done by the actually filling in destroying those wet lands. The current damage would consist only of erosion off the fill into the surrounding waters and, relatively, that would be of lesser impact and could probably not be stopped in any event since it now becomes an act of nature.

Moreover, while plaintiffs might prevail in a citizen suit, the type of relief obtainable is clearly not a guarantee of adequate relief. The most the court can actually compel the Administrator to do is investigate the matter. It is Petitioners' position that Mr. Raab lacked the authority in the first instance to emplace the fill and that he should not be permitted to present a *fait accompli* to both governmental and private entities. Of course only a plenary hearing would determine the validity of such allegations but assuming for the moment that they are correct, the FWPCA affords no means to compel Mr. Raab to remove the fill because the Administrator must first determine that there has been some violation and that is a matter of judgment and discretion. There is no guarantee that the Administrator will or must reach the same conclusion that the Division Engineer reached—that the fill ought to be removed and an application for permit to fill should be denied. Unless an action can at least potentially result in that type of relief, lesser relief is not adequate. Of course, there is the separate question of whether a court would reach the conclusion that it was an appropriate remedy to compel this removal but if the FWPCA does not even permit a court to consider this, then it does not afford a means to obtain adequate relief.

For these reasons it is submitted that the District Court erred in holding that the FWPCA afforded adequate remedy in this matter.

CONCLUSION

In essence, this is a situation where there was an act done which arguably should not have been done. If the District Court and Circuit Court are correct, it is a wrong without a remedy—but only if an action is brought in the districts encompassed by the Third Circuit. If brought in another circuit, the suit would proceed to a ruling on its merits. This situation is unnecessary and can readily be rectified on way or the other by this Court granting Certiorari and making a formal determination as to the scope of the APA vis-à-vis the question of jurisdiction.

If the lower courts are correct, the plaintiffs are left to face a wrong without a remedy, which is almost anachronistic.

Respectfully submitted,

/s/ Stephen B Patrick

STEPHEN B. PATRICK
Northwest Boulevard
P.O. Box 304
Newfield, New Jersey 08344
Counsel for Petitioners

APPENDIX

APPENDIX A

OPINION OF U.S. DISTRICT COURT

(Filed November 24, 1975)

Stephen B. Patrick, Esquire
Northwest Boulevard,
P.O. Box #304
Newfield, New Jersey 08344
(*Attorney for Plaintiffs*)

Garry J. Roettger, Esquire
Messrs. Hiering, Grasso, Gelzer & Kelaher
Hiering Building
Courthouse Square
Toms River, New Jersey 08753
(*Attorney for Defendant Raab*)

A. Patrick Nucciarone, Esquire
Assistant United States Attorney
Federal Building
Federal Square
Newark, New Jersey 07101
(*Attorney for remaining Defendants*)

RE: LOVELADIES PROPERTY OWNERS ASSOCIATION, INC., a corporation of the State of New Jersey; JOINT COUNCIL OF TAXPAYERS ASSOCIATIONS OF SOUTHERN OCEAN COUNTY, INC., a corporation of the State of New Jersey; and LONG BEACH ISLAND CONSERVATION SOCIETY, INC., a corporation of the State of New Jersey v. MAX RAAB, UNITED STATES ARMY CORPS OF ENGINEERS, COL. C. A. SELLECK, JR., District Engineer, Philadelphia District, United

States Army Corps of Engineers, BG JAMES L. KELLY, Division Engineer, North Atlantic Division, United States Army Corps of Engineers, UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, and GERALD M. HANSLER, Regional Director, Region II, United States Environmental Protection Agency. (Civil Action No. 74-1549)

Gentlemen:

This case arises out of land-filling operations conducted by defendant Max L. Raab on property located on the edge of Barnegat Bay in Long Beach Township, New Jersey. The filling was performed between October and December of 1972. Raab received no prior authorization for his activities from the Environmental Protection Agency (hereinafter "EPA") or the Army Corps of Engineers (hereinafter "COE"). Plaintiffs, which are three associations of taxpayers and property-owners in the Long Beach Island area, contend that Raab's non-approved filling operations were violative of the Rivers and Harbors Act of 1899, 33 U.S.C. §401, *et seq.*, and the Federal Water Pollution Control Act Amendments of 1972 (hereinafter "FWP CAA"), 33 U.S.C. §1251, *et seq.* In the present action, plaintiffs seek to compel the EPA and COE to determine whether Raab's activities were proper and should be approved.

The procedural background of this case is significant. In late 1972, COE personnel observed Raab's filling operations. Colonel Carroll Strider, Chief of the COE's Philadelphia office, wrote to Raab and directed him to cease all filling activity, and to apply to the COE for an after-the-fact permit. Raab had already completed his filling operations by the time he received Colonel Strider's letter. He did submit an application for an after-the-fact permit in early 1973. Upon a more thorough investigation, the COE

determined that the filling operations occurred above the "mean high water line" and, therefore, were beyond what the COE conceives to be its statutory jurisdiction. But see *United States v. Holland*, 373 F.Supp. 665 (M.D. Fla. 1974). Accordingly, COE did not rule on the merits of Raab's application for a permit, even though considerable opposition to the grant of a permit had been received from individuals, organizations, and state and federal agencies. The COE's determination was communicated to Raab in October, 1974. The EPA apparently was requested to exercise its jurisdiction, but refused to do so. Accordingly, plaintiffs initiated the present lawsuit.[1] The case is now before the Court on defendants' motions to dismiss the complaint and on the parties' cross-motions for summary judgment.

The federal statutory scheme regarding the discharge of fill materials into United Statts waters may be briefly summarized as follows: Section 404 of the FWPCAA, 33 U.S.C. §1344, authorizes the Secretary of the Army, acting through the COE, to issue permits to persons desiring to discharge fill materials into the navigable waters of the Unittd States.[2] Section 301(a) of the FWPCAA, 33 U.S.C. §1311(a), makes the discharge of fill material, without a permit, unlawful. Finally, §309(3) of the FWPCAA, 33 U.S.C. §1319 (3), requires the Administrator of the EPA to issue an order requiring compliance or to institute a civil action

1. Plaintiffs' original complaint named only Raab and the United States of America as party-defendants. The United States moved to dismiss on the grounds of sovereign immunity, lack of subject matter jurisdiction, and failure to state a claim upon which relief may be granted. Plaintiffs then consented to a dismissal of their suit against the United States, and subsequently filed an amended complaint naming as defendants the EPA, the COE, and various officials thereof. These defendants contend that the dismissal of the complaint against the United States should bar the present action against United States agencies and employees on the ground of *res judicata*. We are not satisfied that the *res judicata* doctrine is applicable here. In any event, in light of our dismissal of this case on other grounds, we need not consider that argument.

2. This section supplements a similar permit provision in the Rivers and Harbors Act of 1899, see 33 U.S.C. §403.

once he determines that a person has discharged fill materials without a permit, in violation of 33 U.S.C. §1311. In the present case, the COE and the EPA have refused to act undtr this statutory framework—apparently concluding that Raab did not deposit fill in the *navigable* waters of the United States.[3] Plaintiffs, of course, vigorously contest this conclusion. With this background in mind, we proceed to the motion presently before us.

At the outset, the defendants contend that the plaintiff organizations lack standing to bring this complaint. In *Association of Data Processing Service Organizations v. Camp*, 397 U.S. 150 (1970), the Supreme Court set forth a twofold test for determining whether particular plaintiffs have standing to challenge administrative action. Under the *Data Processing* test, the court must inquire: (1) whether plaintiff suffered injury-in-fact from the challenged action, 397 U.S. at 152; and (2) "whether the interest sought to be protected by the complainant is arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question," 397 U.S. at 153. Without doubt the second *Data Processing* requirement is satisfied by the plaintiffs here—at least insofar as the complaint arises under the FWPCAA.[4] The in-

3. The FWPCAA defines "navigational waters" broadly as "the waters of the United States," 33 U.S.C. §1362(7). The United States District Court for the Middle District of Florida has concluded that the term "navigational waters," thus defined, provides no jurisdictional limitation on the reach of the FWPCAA. *United States v. Holland*, 373 F. Supp. 665 (M.D. Fla. 1974).

4. However, plaintiffs probably do not have standing under the Rivers and Harbors Act of 1899, 33 U.S.C. §401, *et seq*. This Act was intended to protect the navigability of the nation's waterways. See Discussion of 1899 Act, *infra*. Plaintiffs here make no allegation that Raab's activities affect their interest in navigable waters. Rather, their concern seems to be purely environmental. Thus, they are not arguably "within the zone of interests" intended to be protected by the Rivers and Harbors Act. Moreover, as we later point out in this opinion, see Discussion of 1899 Act, *infra*, a private right of action cannot be implied from the Rivers and Harbors Act. The Supreme Court has pointed out the considerable overlap between the "standing" issue and the "implied right of action" issue. See *National Railroad Passenger Corp. v. National Association of Railroad Passengers*, 414 U.S. 453, 456 (1974).

clusion of a "citizen suits" provision in the FWPCAA, 33 U.S.C. §1365, indicates that Congress specifically intended that the interests of private citizens be protected by the Act.

The issue remaining, then, is whether plaintiffs in the present case have alleged sufficient injury-in-fact to maintain their challenge to Raab's activities. In *Sierra Club v. Morton*, 405 U.S. 727 (1972), the Supreme Court discussed at length the injury-in-fact requirement:

> "The trend of cases arising under the APA and other statutes authorizing judicial review of federal agency action has been toward recognizing that injuries other than economic harm are sufficient to bring a person within the meaning of the statutory language, and toward discarding the notion that an injury that is widely shared is *ipso facto* not an injury sufficient to provide the basis for judicial review. We noted this development with approval in *Data Processing*, 397 U.S., at 154, in saying that the interest alleged to have been injured 'may reflect "aesthetic, conservational, and recreational" as well as economic values.' But broadening the categories of injury "that may be alleged in support of standing is a different matter from abandoning the requirement that the party seeking review must himself have suffered an injury.
>
> "Some courts have indicated a willingness to take this latter step by conferring standing upon organizations that have demonstrated 'an organizational interest in the problem' of environmental or consumer protection. *Environmental Defense Fund v. Hardin*, 138 U. S. App. D. C. 391, 395, 428 F.2d 1093, 1097. It is clear that an organization whose members are injured may represent those members in a proceeding for judicial review. See, *e. g.*, *NAACP v. Button*, 371 U.S.

> 415, 428. But a mere 'interest in a problem,' no matter how longstanding the interest and no matter how qualified the organization is in evaluating the problem, is not sufficient by itself to render the organization 'adversely affected' or 'aggrieved' within the meaning of the APA. . . ." 405 U.S. at 738-9 (footnotes omitted).

Upon applying these principles in *Sierra Club*, the Supreme Court held that the Sierra Club did not have standing to challenge a proposed commercial development in Mineral King Valley, California, because the Club did not allege that its members used the Mineral King area for recreational, aesthetic, or other purposes. 405 U.S. at 735, 739-40.

The allegations in the present case differ substantially from the *Sierra Club* allegations. Here, the plaintiffs do not merely allege that they have a generalized interest in conservation and the environment. Compare *Sierra Club v. Morton, supra*, 405 U.S. at 735, 739. Instead, the plaintiff organizations allege that their members are "directly affected" by the ecological system of Barnegat Bay; that they enjoy the area's aesthetic benefits; that they use the area for recreational activities; and that the value of the properties they own in the area would be adversely affected by a deterioration in the environmental quality of the Bay. Clearly, these allegations of specific injury are sufficient to confer standing on the plaintiffs under the standards set forth in *Sierra Club*. See *United States v. Students Challenging Regulatory Agency Procedures (SCRAP)*, 412 U.S. 669, 683-90 (1973); *Montgomery Environmental Coalition v. Fri*, 366 F.Supp. 261, 263-4 (D.D.C. 1973).

While the plaintiffs thus have standing under the FWPCAA, their challenge to Raab's filling operations must nonetheless be dismissed for failure to comply with the

procedural requirements of the Act's "citizen suits" provision, 33 U.S.C. §1365. Section 1365 provides, *inter alia*, that an action against the EPA Administrator for failure to fulfill his duties may not be commenced prior to sixty (60) days after notice of the action has been given to the Administrator, 33 U.S.C. §1365(b)(2). Similarly, an action against a private violator of the Act may not be commenced prior to sixty (60) days after notice of the action has been given to the Administrator, to the state in which the alleged violation occurs, and to the alleged violator, 33 U.S.C. §1365(b)(1). The EPA has published regulations specifically detailing who should receive the notice and what information should be contained in the notice. See 40 C.F.R. §§135.2 and 135.3. The plaintiffs herein have not complied with the notice provisions of §1365 nor with the provisions of the EPA's regulations. Indeed, the Administrator of the EPA is not even named as a party to the lawsuit—even though §1365 clearly contemplates that suits against the EPA should be directed at the Administrator.

Plaintiffs contend that the technical requirements of §1365 should be ignored in the present case because the "spirit" of the requirements has been satisfied. Plaintiffs point out that they did notify the Regional Director of EPA more than sixty (60) days before filing their amended complaint. However, this Court is not at liberty to ignore the requirements of federal statutes and regulations—"technical" though they may appear to be. Where Congress provides a statutory method for obtaining review of administrative decisions, that method must be strictly adhered to. See *Weinberger v. Salfi*, 43, U.S.L.W. 4985, 4987-90 (U.S., June 26, 1975); *United States v. Ruzicka*, 329 U.S. 287 (1946); *SEC v. Andrews*, 88 F.2d 441 (2d Cir. 1937). The plaintiffs' failure to do so here compels the Court to dismiss their action under the FWPCAA. Com-

pare *Pinkney v. Ohio Environmental Protection Agency*, 375 F. Supp. 305, 307-9 (N.D. Ohio 1974); *City of Highland Park v. Train*, 374 F. Supp. 756, 765-67 (N.D. Ill. 1974).[5]

As jurisdictional alternatives to the FWPCAA, the plaintiffs seek to rely on the Rivers and Harbors Act of 1899, 33 U.S.C. §401, *et seq.*, the Administrative Procedure Act, 5 U.S.C. §551, *et seq.*, and §701, *et seq.*, and the federal mandamus statute, 28 U.S.C. §1361. All of these claims must fail.

While this Court may have jurisdiction to hear plaintiffs' claim insofar as it "arises under the Rivers and Harbors Act, see 28 U.S.C. §§1331 and 1337, the claim under that Act must nonetheless be dismissed for failure to state a claim upon which relief may be granted. In substance, the Rivers and Harbors Act provides for the assessment of civil and criminal penalties against persons or corporations who, without authorization, perform some activity which might impede the navigability of the nations waterways. The Act contains no express authorization of private civil actions. Nor can such a private remedy fairly be implied from the text and purpose of the Act. See *Red Star Towing and Transportation Co. v. Department of Transportation of New Jersey*, 423 F.2d 104, 105-6 (3d Cir. 1970); cf. *Guthrie v. Alabama By-Products Co.*, 328 F.Supp. 1140, 1144-9 (N.D. Ala. 1971), *affd*, 456 F.2d 1294 (5th Cir. 1972); n. 4, *supra*.

5. We are aware that several courts have held that the FWPCAA's "citizen suits" provision is not an exclusive remedy, and that claims arising under the FWPCAA also may be brought to the general federal question jurisdictional provision, 28 U.S.C. §1331—thereby avoiding the procedural requirements of the "citizen suits" provision. See, *e.g.*, *Natural Resources Defense Council v. Train*, 510 F.2d 692, 698-704 (D.C. Cir. 1975); *Conservation Society of Southern Vermont v. Secretary of Transportation*, 508 F.2d 927, 938-9 (2d Cir. 1974); cf. *City of Highland Park v. Train*, *supra*, 374 F. Supp. at 767. This position finds support in the so-called "savings clause" of the citizen suits provision, see 33 U.S.C. §1365(e). However, plaintiffs in the present case do not purport to invoke general federal question jurisdiction, and, in any event, would be hard-pressed to satisfy the $10,000. jurisdictional amount requirement of 28 U.S.C. §1331.

Similarly, plaintiffs cannot maintain this action on the authority of the Administrative Procedure Act. While the various circuits are irreconcilably split on the issue, compare, *e.g.*, *Twin Cities Chippewa Tribal Council v. Minnesota Chippewa Tribe*, 370 F.2d 529 (8th Cir. 1967) with *Pickus v. United States Board of Parole*, 507 F.2d 1107 (D.C. Cir. 1974) the clear law in the Third Circuit is that the, Administrative Procedure Act does not create an independent jurisdictional basis for suits challenging government agency actions. *Chaudoin v. Atkinson* 494 F.2d 1323, 1328 (3d Cir. 1974); *Zimmerman v. United States*, 422 F.2d 326, 330-32 (3d Cir. 1970), *cert. denied*, 399 U.S. 911 (1970).

Finally, the plaintiffs attempt to invoke federal mandamus jurisdiction, 28 U.S.C. §1361,[6] also must fail. Mandamus is an extraordinary remedy, available only in situations where government officials clearly have failed to perform nondiscretionary duties. See *Carter v. Seamans*, 411 F.2d 767, 773 (5th Cir. 169), *cert. denied*, 397 U.S. 941 (1969). Moreover, mandamus is not available when an alternative adequate remedy exists. See *Ex parte Republic of Peru*, 318 U.S. 578, 584 (1943), *Richardson v. United States*, 465 F.2d 844, 849 (3d Cir. 1972), *rev'd on other grounds*, 418 U.S. 166 (1974); *Carter v. Seamans*, *supra*.

In the present case, plaintiffs obviously have an alternative adequate remedy—that is, an action under the "citizen suits" provision of the FWPCAA. Such an action, if successful, would result in an order requiring the EPA to exercise jurisdiction over Raab's filling activities. In effect,

6. This statute was enacted in 1962. The statute was not intended to enlarge the scope of mandamus relief, but, rather, was intended to make the remedy more readily available in districts outside the District of Columbia. See *Jarrett v. Resor*, 426 F.2d 213, 216 (9th Cir. 1970); *Carter v. Seamans*, 411 F.2d 767, 773 (5th Cir. 1969), *cert. denied*, 397 U.S. 941 (1969). See generally Byse & Fiocca, *Section 1361 of the Mandamus and Venue Act of 1962 and "Nonstatutory" Judicial Review of Federal Administrative Action*, 81 Harv. L. Rev. 308 (1967).

plaintiffs would receive the complete relief sought in the present action. Where Congress establishes a statutory method for reviewing administrative action, as here, an aggrieved party cannot avoid compliance with the statutory process by bringing a mandamus action. See *Wilmot v. Doyle*, 403 F.2d 811, 816 (9th Cir. 1968).

In accordance with this opinion, defendants' motions to dismiss the complaint are granted. Plaintiffs' motion for summary judgment is denied. An appropriate order will be submitted.

Very truly yours,

/s/ George H. Barlow
GEORGE H. BARLOW
United States District Judge

GHB/ebj

APPENDIX B
ORDER OF U.S. COURT OF APPEALS

Argued November 30, 1976

Before ROSENN, KALODNER and GARTH,

Circuit Judges.

JUDGMENT ORDER

After consideration of the contentions raised by appellant, it is

ADJUDGED AND ORDERED that the judgment of the district court be and is hereby affirmed.

Costs taxed against appellant.

By the Court,

/s/ Max Rosenn
Circuit Judge

Attest:

/s/ M. Elizabeth Ferguson
Chief Deputy Clerk

DATED: December 7, 1976

No. 76-1231

In the Supreme Court of the United States

OCTOBER TERM, 1976

LOVELADIES PROPERTY OWNERS ASSOCIATION, INC., ETC., ET AL., PETITIONERS

v.

MAX RAAB, UNITED STATES ARMY CORPS OF ENGINEERS, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

WADE H. MCCREE, JR.,
Solicitor General,

JAMES W. MOORMAN,
Acting Assistant Attorney General,

EDMUND B. CLARK,
ERICA L. DOLGIN,
Attorneys,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-1231

LOVELADIES PROPERTY OWNERS ASSOCIATION, INC., ETC., ET AL., PETITIONERS

v.

MAX RAAB, UNITED STATES ARMY CORPS OF ENGINEERS, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The court of appeals entered no opinion. The opinions of the district court are unreported (Pet. App. A, pp. 1a-10a and App. A, *infra*, pp. 1a-8a).

JURISDICTION

The judgment of the court of appeals was entered on December 7, 1976 (Pet. App. B, p. 11a). The petition for a writ of certiorari was filed on March 4, 1977. The jurisdiction of this Court is invoked under 28 U.S.C. 1257(3). The correct jurisdictional provision is 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the Administrative Procedure Act, 5 U.S.C. 701 *et seq.*, is an implied grant of jurisdiction to review agency action.

2. Whether the district court properly determined that jurisdiction pursuant to the mandamus statute, 28 U.S.C. 1361, was inappropriate.

STATEMENT

The facts are set forth in detail in the initial opinion of the district court (Pet. App. A, pp. 2a-3a).

In November 1972, personnel of the United States Army Corps of Engineers observed filling operations being conducted along the Atlantic coastline in Long Beach Township, Ocean County, New Jersey. An investigation indicated that the property was owned by the respondent Max Raab and that he had no authorization from the Corps of Engineers to conduct the filling operations.

The Corps of Engineers directed Raab to cease the filling operations and to apply to it for a permit. Raab submitted an application for a permit. After further review of the area and of Raab's filling operations, however, the Corps of Engineers determined that the area involved was not within the regulatory jurisdiction of the Corps of Engineers and, therefore, that no permit was required.

Petitioners, three associations of taxpayers and property owners in the Long Beach Island area, then instituted a civil action in the United States District Court for the District of New Jersey against Raab and the United States of America. They sought an injunction against further filling by Raab on his property; a declaratory judgment that the federal government had jurisdiction over the property on which the filling operations had been conducted; and an order

requiring Raab to file an application for a permit with the Environmental Protection Agency, requiring that Agency to order Raab to file an application with it, and requiring the Corps of Engineers and the Environmental Protection Agency to rule on the merits of Raab's applications. Jurisdiction was based upon the Rivers and Harbors Act of 1899, 30 Stat. 1151, as amended, 33 U.S.C. 401 *et seq.* (1899 Act), and the Federal Water Pollution Control Act Amendments of 1972, 86 Stat. 816, as amended, 33 U.S.C. (Supp. V) 1251 *et seq.* (FWPCA Amendments).

The district court dismissed the complaint for lack of jurisdiction and failure to state a claim upon which relief could be granted (Pet. App. A, pp. 1a-10a). The court stated that the 1899 Act provided no basis for jurisdiction because it contained no express authorization of private civil actions (*id.* at 8a). The court held that, because petitioners had not complied with the sixty-day notice requirement of the citizen suit provision of the FWPCA Amendments, 33 U.S.C. (Supp. V) 1365, the FWPCA Amendments did not confer jurisdiction (*id.* at 6a-7a). The court also ruled that neither the Administrative Procedure Act, 5 U.S.C. 551 *et seq.* and 701 *et seq.*, nor the federal mandamus statute, 28 U.S.C. 1361, provided jurisdiction. It held that the former did not create an independent jurisdictional basis for suits challenging government agency actions and that the latter was inapposite because an adequate alternative remedy existed under the citizen suit provision of the FWPCA Amendments (*id.* at 9a-10a).

In a subsequent opinion, the district court clarified its decision by stating that, while the petitioners' 1899 Act claims were dismissed with prejudice, the claims arising under the FWPCA Amendments were dismissed without prejudice (App. A, *infra*, pp. 1a-8a; final order, App. B, *infra*, pp. 9a-10a). The United States Court of Appeals for the Third Circuit affirmed the judgment

of the district court without opinion (Pet. App. B, p. 11a).

ARGUMENT

The court of appeals correctly affirmed the dismissal of the complaint. The Administrative Procedure Act does not create an independent jurisdictional basis for a suit challenging federal agency actions. *Califano* v. *Sanders*, No. 75-1443, decided February 23, 1977.

The district court correctly determined that the mandamus statute, 28 U.S.C. 1361, did not provide a basis for relief. For mandamus to issue, plaintiffs must show that an agency or its officers are under a clear affirmative duty that is "devoid of the exercise of judgment or discretion." *Clackamas County, Oregon* v. *McKay*, 219 F. 2d 479, 489 (C.A. D.C.); *Richardson* v. *United States*, 465 F. 2d 844, 849 (C.A. 3), reversed on other grounds, 418 U.S. 166; *United States* v. *Walker*, 409 F. 2d 477 (C.A. 9). Petitioners did not make such allegations.

Moreover, mandamus is not available when an alternative adequate remedy exists. *Ex parte Republic of Peru*, 318 U.S. 578, 584; *Richardson* v. *United States*, *supra*. The district court dismissed the present action without prejudice insofar as it was based on the citizen suit provision of the FWPCA Amendments, 33 U.S.C. (Supp. V) 1365, because petitioners had not complied with the sixty-day notice requirement, and stated: "[Petitioners] obviously have an alternative adequate remedy—that is, an action under the 'citizen suits' provisions of the FWPCAA." Pet. App. A, p. 9a. Further review of that decision is not warranted.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

WADE H. MCCREE, JR.,
Solicitor General.

JAMES W. MOORMAN,
Acting Assistant Attorney General.

EDMUND B. CLARK,
ERICA L. DOLGIN,
Attorneys.

JUNE 1977.

APPENDIX A

UNITED STATES DISTRICT COURT

DISTRICT OF NEW JERSEY

CHAMBERS OF
GEORGE H. BARLOW
JUDGE

FEDERAL BUILDING
TRENTON, NEW JERSEY 08605

February 2nd, 1976.

NOT FOR PUBLICATION

FILED
February 3, 1976
At 4:30 p.m.
ANGELO W. LOCASCIO
Clerk

Stephen B. Patrick, Esquire
Northwest Boulevard
P.O. Box No. 304
Newfield, New Jersey 08344
(Attorney for Plaintiffs)

Garry J. Roettger, Esquire
Messrs. Hiering, Grasso, Gelzer & Kelaher
Hiering Building
Courthouse Square
Toms River, New Jersey 08753
(Attorney for Defendant Raab)

A. Patrick Nucciarone, Esquire
Assistant United States Attorney
970 Broad Street
Newark, New Jersey 07101
(Attorney for all other Defendants)

RE: LOVELADIES PROPERTY OWNERS ASSOCIATION, INC., a corporation of the State of New Jersey; JOINT COUNCIL OF TAXPAYERS ASSOCIATIONS

OF SOUTHERN OCEAN COUNTY, INC., a corporation of the State of New Jersey; and LONG BEACH ISLAND CONSERVATION SOCIETY, INC., a corporation of the State of New Jersey v. MAX RAAB, UNITED STATES ARMY CORPS OF ENGINEERS, COL. A. SELLECK, JR., District Engineer, Philadelphia District, United States Army Corps of Engineers, BG JAMES L. KELLY, Division Engineer, North Atlantic Division, United States Army Corps of Engineers, UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, and GERALD M. HANSLER, Regional Director, Region II, United States Environmental Protection Agency. (Civil Action No. 74-1549)

OPINION

Gentlemen:

This case arises out of certain land-filling operations conducted by Max L. Raab on property located near Barnegat Bay in Long Beach Township, New Jersey. The facts and procedural background of the case are adequately set forth in this Court's opinion of November 24th, 1975. In that opinion, the Court held that plaintiffs' action must be dismissed. The case currently is before the Court on defendants' motion to settle the form of an order of dismissal. The parties have been unable to agree on whether the dismissal should be "with prejudice" or "without prejudice".

Our view is that the action must be dismissed without prejudice insofar as it arises under the Federal Water Pollution Control Act Amendments of 1972, 33 U.S.C. §1251, *et seq.* This conclusion necessarily follows from the reasoning of our opinion. Therein, at page 6, we stated: "[plaintiffs'] challenge to Raab's filling operations must

be dismissed for failure to comply with the procedural requirements of the [FWPCAA's] 'citizen suits' provision. 33 U.S.C. §1365". We went on to say: "Where Congress provides a statutory method for obtaining review of administrative decisions, that method must be strictly adhered to . . . . The plaintiffs' failure to do so here compels the Court to dismiss their action under the FWPCAA." This language indicates clearly that our opinion rested on procedural grounds, and did not purport to reach the merits of plaintiffs' FWPCAA claim. Accordingly, that basis for dismissal was not intended to result in a dismissal with prejudice. Professor Moore has stated the applicable principles:

> "[O]rdinarily a judgment dismissing an action or otherwise denying relief for want of jurisdiction, venue, or related reasons does not preclude a subsequent action in a court of competent jurisdiction on the merits of the cause of action originally involved." [1B Moore's Federal Practice para. O.405[5], at p. 659.]

> "It has been pointed out that a final termination of an action short of a determination of the merits—as upon a sustained plea of lack of jurisdiction or improper venue—is judicially conclusive, in a subsequent suit, as to the precise matters adjudged, but will not bar a second suit between the parties or their privies on the same cause of action unless those issues are again decisive, and even if the prior judgment necessitates a dismissal of the second action, the cause of action is "still not barred by res judicata until there is a final determination on the merits. And 'merits' means 'the real or substantial grounds of action or defense as distinguished from matters of practice,

> procedure, jurisdiction or form.' " [1B Moore's Federal Practice para. 0.409[1], at p. 1003 (footnotes omitted).]

See *Smith v. Pittsburgh Gage and Supply Co.*, 464 F. 2d 870, 874 (3rd Cir. 1972); *Etten* v. *Lovell Manufacturing Co.*, 225 F. 2d 844, 846 (3d Cir. 1955), *cert. denied*, 350 U.S. 966 (1956).

The defendants insist, however, that even if we had reached the merits of the FWPCAA claim, we would have been compelled to rule that the plaintiffs were not entitled to relief. To engage in such an inquiry now, on a motion to settle the form of an order of dismissal, is most unusual, and would appear to be tantamount to the sort of advisory decision-making prohibited by Article 3 of the Constitution. Cf. *Pacific Intermountain Express Co. v. Hawaii Plastics Corp.*, No. 75-1445 (3d Cir. January 9, 1976). In any event, we are not convinced that the grounds pressed by the defendants would indeed bar plaintiffs from ultimately prevailing on the merits of this case (should the jurisdictional defects be surmounted). We will briefly set forth our difficulties with the defendants' various arguments.

Initially, the federal government defendants (various agencies and employees) insist that the FWPCAA action is *res judicata* as to them because of the dismissal by consent of a previous action brought by the plaintiffs against the United States. See n. 1 of our opinion of November 24th, 1975. This dismissal occurred after the United States had filed a motion urging a number of grounds for dismissal, including some which went to the merits of the FWPCAA claim. The dismissal order, however, specifies no particular ground for dismissal. "And when a number of grounds for dismissal are urged, an order of the court simply that the cause be dismissed, without an indication of the ground

upon which the court acted, cannot be res judicata as to any of the grounds for such order." 1B Moore's Federal Practice para. 0.409[1], at p. 1009. See *Scrofani v. Miami Rare Bird Farm*, 208 F. 2d 461, 464 (5th Cir. 1953). Thus, plaintiffs' FWPCAA claim probably is not barred by the *res judicata* doctrine.

Next, the defendants argue that Raab's filling activities already have been completed and that there is nothing the Environmental Protection Agency (EPA) can do about it now. However, we are aware of no provision of the FWPCAA which limits the EPA's enforcement jurisdiction to cases where the polluting activity is ongoing rather than completed. Section 309 of the FWPCAA, 33 U.S.C. §1319, which is the principal enforcement provision, empowers the Administrator of EPA to issue orders requiring violators to comply with the Act. In the present case, it presumably is possible for the EPA to order Mr. Raab to apply for a permit for his filling activities,[1] and, if such a permit is denied, to order him to take some action to restore the environmental quality of the area. Cf. *United States v. Holland*, 373 F. Supp. 665, 676-7 (M.D. Fla. 1974).

The defendants next suggest that the FWPCAA permits citizen suits against the Administrator of EPA only where the Adminstrator is alleged to have failed to perform a non-discretionary duty. 33 U.S.C. §1365(a)(2). But in the present case it may easily be argued that the Administrator has failed to perform a non-discretionary duty. Section 309

---

[1]Section 404 of the FWPCAA, 33 U.S.C. §1344, empowers the Secretary of the Army, acting through the Chief of Engineers, to issue permits allowing the discharge of fill materials into navigable waters. As our previous opinion indicates, at p. 2, the Army apparently has a procedure for obtaining "after-the-fact" permits.

(3) of the FWPCAA, 33 U.S. §1319(3), provides that, whenever the Administrator determines from the facts available to him that an unlawful act has occurred, he "*shall* issue an order requiring such person to comply . . .. or he *shall* bring a civil action . . . ." (emphasis added). This statutory scheme admits of no discretion in a situation like the present case—where, accepting plaintiffs' factual averments as true, there would appear to be a clear violation of the FWPCAA. See 33 U.S.C. §1311; *United States v. Holland, supra.*

Finally, the defendants contend that polluting activities occurring before July 1st, 1973, are not cognizable in a citizen suit. See 33 U.S.C. §1365(f). Here, the alleged polluting activities occurred between October and December, 1972. However, the language of the citizen suits provision indicates that the July 1st limitation may only apply to actions brought pursuant to 33 U.S.C. §1365(a)(1), and not to actions brought pursuant to 33 U.S.C. §1365(a)(2) (actions against the Administrator). While our attention has been directed to a paragraph in a Senate Report which suggests a contrary interpretation, see 2 U.S. Code Congressional and Administrative News 3668, 3747 (92d Cong., 2d Sess., 1972), we are reluctant to accept this interpretation without a more complete analysis of the legislative history—especially since the language of 33

U.S.C. §1365[2] itself does not appear to support the Senate Report's comments.[3]

---

[2]Section 1365(a) provides as follows:

> "(a) Except as provided in subsection (b) of this section, any citizen may commence a civil action on his own behalf
>
> (1) against any person (including (i) the United States, and (ii) any other governmental instrumentality or agency to the extent permitted by the eleventh amendment to the Constitution) who is alleged to be in violation of (A) an effluent standard or limitation under this chapter or (B) an order issued by the Administrator or a State with respect to such a standard or limitation, or
>
> (2) against the Administrator where there is alleged a failure of the Administrator to perform any act or duty under this chapter which is not discretionary with the Administrator.
>
> The district courts shall have jurisdiction, without regard to the amount in controversy or the citizenship of the parties, to enforce such an effluent standard or limitation, or such an order, or to order the Administrator to perform such act or duty, as the case may be, and to apply any appropriate civil penalties under section 1319(d) of this title."

Section 1365(f) provides, in relevant part:

> "(f) For purposes of this section, the term "effluent standard or limitation under this chapter" means (1) effective July 1, 1973, an unlawful act under subsection (a) of section 1311 of this title; . . ."

While this July 1st, 1973, effective date clearly applies to actions brought under 33 U.S.C. §1365(a)(1), it is not so clear to us that the July 1st date also applies to actions against the Administrator pursuant to §1365(a)(2)—which, unlike §1365(a)(1), contains no reference to "an effluent standard or limitation".

[3]The Senate Report states:

> "As pointed out, the Committee bill would provide in the citizen suit provision that actions will lie against the Administrator for failure [to] exercise his duties under the Act, including his enforcement duties. Authority granted to citizens to bring enforcement actions under this section is limited to effluent standards or limitations established administratively under the Act. Such

Accordingly, an order will be entered dismissing plaintiffs' FWPCAA claim without prejudice.[4] In so doing, we emphasize that our views here are not intended to preclude the defendants from raising as defenses in subsequent litigation any of the matters discussed herein. We discussed these matters only to indicate that, contrary to defendants' suggestion, the lack of merit in plaintiffs' FWPCAA claim is not so self-evident as to warrant a dismissal of that claim with prejudice.

Very truly yours,

George H. Barlow
United States District Judge

GHB/ebj

---

standards or limitation are defined in subsection (f) of Section 505 to include the enforcement of an unlawful discharge under section 301(a), effective after July 1, 1973. By limiting the effective date of citizens suits for violation of this provision the Committee believes sufficient time is available for the State and Federal governments to develop fully, and execute the authority contained in section 402."

[4] There is no dispute that the plaintiffs' complaint under the Rivers and Harbors Act of 1899, 33 U.S.C. §401, *et seq.*, must be dismissed *with* prejudice. In our opinion of November 24th, 1975, we held that the Rivers and Harbors Act was not enforceable through private civil actions.

APPENDIX B

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

Civil Action No. 74-1549

LOVELADIES PROPERTY OWNERS ASSOCIATION, INC., a corporation of the State of New Jersey; JOINT COUNCIL OF TAXPAYERS ASSOCIATIONS OF SOUTHERN OCEAN COUNTY, INC., a corporation of the State of New Jersey; and LONG BEACH ISLAND CONSERVATION SOCIETY, INC., a corporation of the State of New Jersey, Plaintiffs,

v.

MAX RAAB, UNITED STATES ARMY CORPS OF ENGINEERS, COL. C. A. SELLECK, JR., District Engineer, Philadelphia District, United States Army Corps of Engineers, BG JAMES L. KELLY, Division Engineer, North Atlantic Division, United States Corps of Engineers, UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, and GERALD M. HANSLER, Regional Director, Region II, United States Environmental Protection Agency, Defendants.

ORDER

In accordance with the Court's opinion of November 24th, 1975, and with the Court's opinion filed this date in the above-entitled matter, IT IS HEREBY ORDERED that this action is dismissed without prejudice insofar as it arises under the Federal Water Pollution Control Act Amendments of 1972, and with prejudce insofar as it arises under the Rivers and Harbors Act of 1899.

It is further ORDERED that plaintiffs' motion for summary judgment is denied. No costs.

George H. Barlow
United States District Judge

Dated: February 3rd. 1976.

FILED
February 3. 1976
At 4:30 p.m.
ANGELO W. LOCASCIO
Clerk